U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18371307

Date: SEPT. 21, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a civil engineer, seeks classification as a member of the professions holding an advanced degree and as an individual of exceptional ability in the sciences, arts, or business. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this employment-based, "EB-2" immigrant classification. *See* section 203(b)(2)(B)(i) of the Act. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner qualifies for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, USCIS may, as a matter of discretion,[1] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, regarding substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign

[1] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[2]

II. ANALYSIS

The record demonstrates that the Petitioner qualifies as a member of the professions, and that he holds two master's degrees in civil engineering from the University of [redacted] Brazil: a master of sciences (2007) and a master of business administration (2018). Therefore, the Petitioner's parallel claim of exceptional ability is moot. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

The Petitioner claims to have held overlapping jobs with construction companies in the Brazilian province of [redacted] with duties including "Design coordination of Real Estate complexes" and "Risk analysis of Real Estate investments":

Employer	Title	From	To
[redacted]	Design director	2006	2014
[redacted]	Structural engineering & const. mgr.	2007	2018
[redacted]	Construction manager	2013	2018

The Petitioner asserts that he owns both [redacted] and [redacted] and that his employment at [redacted] was full-time until he switched to a part-time schedule upon establishing [redacted] The Petitioner also briefly taught courses on civil engineering and real estate at [redacted] University and the University of [redacted] between 2007 and 2009. The Petitioner has been in the United States since 2018 as an F-1 nonimmigrant student.

The substantial merit of the Petitioner's proposed endeavor is not in dispute. For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of his proposed endeavor under the first prong of the *Dhanasar* analytical framework.[3]

In *Dhanasar*, we explained the "national importance" element of the first prong of the framework:

> In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. An undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly be considered to have national importance. . . . An endeavor that has significant potential to employ

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[3] While we may not discuss every document submitted, we have reviewed and considered each one.

> U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance.

Id. at 889-90.

A business plan in the record describes the Petitioner's proposed endeavor as follows:

> [The Petitioner] seeks to improve the efficiency of small, mid-sized and large construction management and real estate investment companies. [The Petitioner] will provide highly specialized consulting services to help his clients improve their financial performance, make better-informed business decisions, and pursue growth strategies. [The Petitioner] will also create his own real estate investment company showing to the market in practice the potential of a rationalized approach of control uncertainties and risks involved in the real estate field.

The Petitioner states his intention of "[p]articipating in at least 12 distinct project engagements over the next 20 months as a consultant," and "[l]aunching at least 12 residential real estate developments in the first 24 months of operations," reaching 40 such developments by the fifth year.

The Petitioner asserts that the proposed endeavor has "significant national importance because it will enhance the financial performance of U.S. businesses and significantly impact the economy, entrepreneurialism and social welfare." The Petitioner also asserts that the "endeavor will effectively streamline processes in construction projects that will significantly reduce time and money spent while increasing financial viability."

Moreover, the Petitioner projects that, during the first five years of operation, the consulting company will "create 12 direct jobs in the first 5 years" and "create 48 additional job opportunities" among its clients, while the real estate development company will "create 25 direct jobs in the first 5 years and 9 indirect jobs," for a total of 94 new jobs.[4] The Petitioner cites no specific source for the job creation estimates, stating instead that they arise from "considering the impact of the company's services on the market," "the momentum in the actual market and the U.S. economy forecast for the next 5 years."

The Petitioner asserts that "the industries impacted by his undertaking are two of the largest and most essential areas to the United States' economy." A particular endeavor does not take on national importance simply because it would be part of a major industry; the collective impact or aggregate size of the entire industry does not give national importance to every component thereof or participant therein.

Background materials intended to establish the significance of the construction industry include information about large-scale construction projects such as airports and skyscrapers, which lie well outside the Petitioner's stated focus on residential housing developments.

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[4] Projected positions at the Petitioner's companies include designers, estimators, data analysts, construction workers, and various management and administrative positions. The business plan does not describe the projected indirect jobs.

In a request for evidence, the Director asked the Petitioner to "document how his endeavor stands to have substantial positive economic effects that will reach beyond his clients to benefit the nation." The Petitioner's response includes a revised version of the business plan. The two versions are mostly identical, except for the projections, many of which have been significantly reduced. The Petitioner revises the job creation numbers downward from 37 to 33 direct jobs, while adding one more indirect job for a total of 58. The Petitioner generally cites "a realistic scenario and the U.S. economy forecast," but does not identify a specific basis for the revisions.

In the denial notice, the Director stated:

> The petitioner has not provided sufficient evidence which establishes that the prospective impact of his proposed endeavor rises to the level of national importance, nor does the record reflect how servicing a particular pool of clients will have broader implications in the field. When determining national importance, the petitioner's evidence must demonstrate how his future endeavor will offer original innovations that will advance the field more broadly.

On appeal, the Petitioner quotes our observation in *Dhanasar* that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." The Petitioner asserts that the Director "fails to acknowledge the potential job opportunities that will result from [the Petitioner's] endeavor," and that "33 direct jobs and 58 . . . indirect jobs are nationally important." The Petitioner further asserts that "there is a direct relationship between employment and economic growth." The Petitioner acknowledges that the pandemic crisis . . . has caused *millions* of Americans to lose their jobs" (emphasis in original), and the Petitioner cites a Department of Labor report indicating that "New Jersey's economy saw a decline of 43,800 jobs lost in the construction industry alone" during April 2020. The Petitioner's observation that the COVID-19 pandemic has led to significant job loss in the construction industry raises the question of how his endeavor will support new jobs when established employers in the same industry have been losing employees, when his endeavor will not directly address the public health crisis that caused the job loss.

Our holding that job creation "may" establish national importance does not presumptively or uniformly exempt employers from the job offer requirement. The Petitioner establishes the great size of the housing and construction industries, but does not explain how the level of projected job creation from his endeavor is nationally important in the context of those very large figures. The assertion that the Petitioner's consulting activity "will be assisting countless . . . businesses" does not explain how his efforts will have a wider impact on the industries involved.

Even within the more limited context of the proposed endeavor itself, the Petitioner revised his business plan, lowering the initial costs from $965,000 to $435,000, and reducing the projected revenues significantly – for instance, from $2.95 million to $1.785 million after two years, and from $5.63 million to $4.1 million after five years. The Petitioner does not explain why these revisions did not proportionately affect his projected employment figures.

The Petitioner asserts that his proposed "endeavor is focused on providing improved construction practices . . . that make construction planning more cost-effective." Once again, there is the question

of scale. The Petitioner does not show that his efforts in this area would produce a benefit beyond his own clients.

For the reasons discussed, we conclude that the Petitioner has not established the national importance of his proposed endeavor. Because this issue, by itself, determines the outcome of the appeal, we decline to reach, and hereby reserve, the appellate arguments regarding the remaining prongs of the *Dhanasar* framework.[5]

III. CONCLUSION

Because the Petitioner has not met the required first prong of the *Dhanasar* analytical framework, we conclude that he has not established eligibility for a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

[5] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).